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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1947.

No. 550

GORDON KEITH DENNY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To The Honorable The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

SUMMARY STATEMENT OF MATTER INVOLVED.

In this petition, petitioner, Gordon Keith Denny, respectfully requests this Honorable Court, to review the Judgment and Decision, of the United States Circuit Court of Appeals, for the Seventh Circuit, in Cause No. 9419, handed down December 30, 1947.

In its decision, the Circuit Court of Appeals, in reviewing a Judgment of the District Court of the United States,

for the Northern District of Indiana, was called upon and did construe The Fifth Amendment to the Constitution of the United States, and Rule 7 (d) of the Federal Rules of Criminal Procedure and the doctrine announced in *Ex Parte Bain*, 121 U. S. 1, relative to the amendment of the indictment involved (R. 274), it is such construction by the Circuit Court, that petitioner seeks to question in the within petition.

The Court of Appeals also sustained the judgment of the District Court on a verdict of the jury, finding petitioner "not guilty" on Count I, that of conspiracy to commit the offense, defined in Title 28, U.S.C. Sec. 415, the transporting of stolen goods in interstate commerce, knowing it to be stolen, and at the same time "guilty" on Count II, charging the substantive crime described by the above statute. This contradictory verdict, on the identical evidence, where the only element in dispute was "guilty knowledge", was likewise challenged both in the trial court and in the Circuit Court of Appeals, and its validity and that of the judgment sustaining it, is sought to be raised in this Court, (R. 275), as being repugnant to the principles set forth in *Sealfon* v. *United States*, ... U. S. ....., 68 Sup. Ct. 237.

Petitioner was convicted in the District Court, of causing stolen meat and butter of the value of $7,000, to be transported from Chicago, Illinois, to Hammond, Indiana, knowing the merchandise had been stolen, in violation of Title 18, Section 415, of the United States Code. (R. 1, 266)

The indictment contained three counts, in two of which petitioner was named. (R. 1) The first count charged petitioner, along with five others with having conspired,

in violation of Title 18, Section 88, U.S.C. (R. 1) to commit the substantive crime set forth in the Second Count, (R. 2) namely the violation of Title 18, Section 415, U.S.C. above. He was found not guilty on the First Count (conspiracy charge) but guilty on the Second Count (the substantive charge). (R. 265)

On Count I of the Indictment, the conspiracy count, petitioner was charged under his own proper name, "Gordon Keith Denny" (R. 1), and on this he was found not guilty. (R. 265)

On Count II, not petitioner, but one "Gordon Keith Kenny" was named. (R. 2). Before arraignment petitioner filed his Verified Motion for Dismissal and Abatement (R. 3), setting forth that he was not the "Gordon Keith Kenny," charged. This motion was overruled and the trial court, (R. 5) on motion of the United States Attorney, (R. 4) over the objection of petitioner, authorized and permitted the United States Attorney to amend this count of the indictment. (R. 5). Pursuant to this action of the court, the United States Attorney physically amended Count II of the indictment, without resubmission to the Grand Jury, by striking therefrom the name "Gordon Keith Kenny," and substituting therefor the name "Gordon Keith Denny." (R. 6)

Thereupon, petitioner filed his Verified Motion for Dismissal, because of the amendment of Count II of the indictment (R. 6); this motion was also overruled. (R. 6).

The principal question presented in the Circuit Court of Appeals, and decided adversely to petitioner, and on which the judgment of this court is now sought, is the right of a United States Attorney, or the Trial Court, to amend an indictment returned by a grand jury, under

the situation presented by the record here, without re-submission to the grand jury.

Petitioner has consistently contended, both in the Trial Court and on appeal in the Circuit Court of Appeals, that the amendment of the indictment, disclosed in this record, is in violation of, and contrary to the provisions of the Fifth Amendment of the Constitution of the United States, and Rule 7 (d) of the Federal Rules of Criminal Procedure. (18 U.S.C. foll. Sec. 687) and the doctrine announced in *Ex Parte Bain*, 121 U. S. 1; that the amendment destroyed the jurisdiction of the court.

The only other question presented was that relating to the contradictory character of the verdict, wherein he was found "not guilty" of having *conspired* to commit the substantive crime, of transporting stolen property in interstate commerce, with guilty knowledge, and at the same time "guilty" of the *substantive* crime itself, where the evidence was identical, and the only element in dispute was "guilty knowledge". A judgment upholding such a verdict, petitioner respectfully submits, is contrary to the holding of the decision of this Honorable Court, in the recent case of *Sealfon* v. *United States*, ... U. S. ....., 68 Sup. C[illegible]7 (Jan. 5, 1948).

Statement Disclosing That This Court Has Jurisdiction To Review the Judgment.

The Transcript of the Record herein affirmatively discloses that the Indictment in this cause, charging petitioner with the violation of a criminal statute of the United States, was filed in the United States District Court for the Northern District of Indiana on June 5, 1946 (R. 1); that thereafter and prior to arraignment, petitioner on June 17, 1946, filed his Motion for Dismissal and Abate-

ment of Count II thereof (R. 3); that on the 20th day of June, 1946, the United States Attorney filed his petition asking leave to amend the indictment (R. 4); that thereafter on the 2nd day of July, 1946, the District Court overruled petitioner's motion for Dismissal and Abatement and granted the United States Attorney's Petition, Asking Leave to Amend the Indictment (R. 5); that pursuant to such order, on October 11, 1946, the United States Attorney Amended Count II of the Indictment by striking therefrom the name "Gordon Keith Kenny," and substituting therefor the name "Gordon Keith Denny," (R. 5).

That thereafter on the 18th day of October, 1946, Petitioner filed his Verified Motion to Dismiss the Amended Count II of the Indictment (R. 6); that this motion was by the Court overruled on the 14th day of November, 1946. (R. 9) Thereafter on the 14th day of November, 1946, petitioner was arraigned on the Amended Count II of the Indictment, and pleaded not guilty to both Counts I and II of the Indictment. (R. 9).

Subsequently on May 12, 13, 14, 1947, Jury Trial was held on the within Indictment, and the Amended Count II thereof, and the jury on the 14 day of May, 1947, returned a verdict of not guilty, on Count I, and guilty, on the Amended Count II. (R. 265)

That thereafter on the 24 day of May, 1947, petitioner duly filed his Motion in Arrest of Judgment of the Amended Count II of the Indictment (R. 266) which motion was by the court overruled on May 26, 1947 (R. 269). Judgment on the verdict was entered on May 26, 1947 (R. 270).

Proceedings in Circuit Court of Appeals.

That Notice of Appeal was filed in the United States District Court for the Northern District of Indiana on June 2, 1947 (R. 271); and that thereafter on the 19 day of September, 1947, transcript of the Record was filed in United States Circuit Court of Appeals within the time allowed therefor (R. 277); that briefs were filed within the time allowed by the court, and that argument was had in the Circuit Court of Appeals on the 20th day of November, 1947; that the Circuit Court of Appeals handed down its judgment and decision adverse to petitioner on the 30th day of December, 1947. (R. 282)

That petitioner now files this his petition for a Writ of Certiorari, together with printed Transcript of the Record herein in this Honorable Court, within the time allowed and provided by the Statutes of the United States, Title 28, U.S.C.A. 344; The Federal Rules of Criminal Procedure, Rule 60 (b); and Rule 38 of the Rules of the Supreme Court of the United States, and that by reason of the aforegoing, this Honorable Court has jurisdiction of the subject matter herein presented.

Questions Presented.

I.

It is contended by petitioner, that, where by mistake in drawing an indictment, a named person is charged as the perpetrator of an offense, instead of the person who has been arrested and who has given bond, such error is fatal and incurable, and the accusation is null and void, as one upon which the apprehended person, not accused of perpetrating the crime, can be arraigned and tried. The petitioner in this case filed his verified motion

for dismissal and abatement, on the ground that his name is "Gordon Keith *Denny*" and not "Gordon Keith *Kenny*", the person named in the indictment. (Tr. 3) He urges that the court erred in overruling this motion. (Tr. 5) He insists that the court, on confession of error by the United States Attorney, should have dismissed Count II as to him, or ordered the indictment resubmitted to the Grand Jury.

II.

It is further contended that, in the courts of the United States no part of the body of an indictment can be amended, after it has been found and presented by a Grand Jury, either by order of the court or on the request of the prosecuting attorney, without being resubmitted to the Grand Jury, with the exception that surplusage may be stricken on the motion of the defendant. The court in this case, at the request of the United States Attorney (Tr. 4) permitted the government to strike from the second count of the indictment the name "Gordon Keith *Kenny*" and to substitute therefor the name "Gordon Keith *Denny*". This ruling of the court, petitioner urges, constitutes reversible error. (Tr. 5) Moreover, that by physically amending Count II of the Indictment, (Tr. 6) the United States Attorney destroyed its efficacy, and deprived the trial court of jurisdiction, to the same extent, "as if the count" had been dismissed or a "nolle prosequi entered"; that accordingly, the trial of the substantive crime charged in Amended Count II, was based and conducted on other than an indictment returned by a Grand Jury, and the judgment based on the verdict of the jury, on the Amended Count, is a nullity and of no legal force or effect.

III.

It is further contended, that to oblige defendant to stand trial on an indictment which has been amended by the United States Attorney, (Tr. 6) without re-submission to the Grand Jury, even though amended by order of the court, is to require him to stand trial on a document of the United States Attorney, and not an indictment returned by a Grand Jury, and to accordingly deprive him of the rights granted him by the Fifth Amendment to the Constitution of the United States.

VI.

Petitioner was charged in one count of the amended indictment with having *conspired* with codefendants to transport stolen goods, (Tr. 1) of the value of $10,000.00 in interstate commerce, knowing them to be stolen. On this charge he was acquitted by the jury. (Tr. 266) In the Amended second count of the indictment, (Tr. 6) covering the single identical transaction, appellant was charged, along with codefendants, with having committed the substantive crime, of having *caused stolen goods* of the value of $10,000.00 to be transported in interstate commerce knowing them to be stolen. On the identical evidence, introduced in proof of both counts, the jury found defendant guilty of the substantive crime charged in Count II. (Tr. 266) Appellant contends that the verdicts are contradictory, that acquittal on the first count, operates to acquit him on the second.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

Pertaining to the Amendment of the Indictment.

1. The Court of Appeals has decided on a federal question in a way in probable conflict with the decisions of this court.

   a. In sanctioning the amendment of Count II of the Indictment, the Circuit Court departed from the principles announced in *Ex Parte Bain*, 121 U. S. 1; 30 L. Ed. 849; 7 S. Ct. 781 and the subsequent decisions of this court, applying or reaffirming same. (As set forth and discussed in the appending brief (p. 22)

2. That the decision of the Circuit Court of Appeals here, conflicts with the decisions of other Circuit Courts of Appeal on the same matter, that of the amendment of the indictment. (As set forth and discussed in the appending brief (p. 25).

3. That the Circuit Court of Appeals has decided an important question of federal law which has not been, but should be settled by this court.

   a. The question presented for the first time to this court, calls for a construction of Rule 7 (d) of the Federal Rules of Criminal Procedure, relating to the amendment of an indictment.

4. That the Circuit Court of Appeals has departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by the United States District Court, as to call for an exercise of this court's power of supervision.

5. That the case involves a question of the interpretation of provisions of the Fifth Amendment of the Constitution of the United States, relating to indictments by a grand jury, which if not decided upon and clarified by this court will leave unsettled an important question of Federal Criminal Procedure.

6. The fact that both judges in the concurring opinion wrote separate opinions, and the third and remaining circuit judge wrote a vigorous dissenting opinion on an important federal question, involving the construction of the Fifth Amendment, Rule 7 (d) of the Federal Rules of Criminal Procedure, and the decision in *Ex Parte Bain* 121 U. S. 1, abundantly justifies a review of the decision by this Court.

II.

Pertaining to Contradictory Verdicts.

1. The opinion in this case is in hopeless conflict with the decision of this Court handed down January 5, 1948, namely, *Sealfon* v. *United States,* ..... U. S. ....., 68 Sup. Ct. 237.

Wherefore your petitioner, referring to the attached brief in support of the foregoing reasons for review, respectfully prays that a Writ of Certiorari be issued out of and under the Seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Seventh Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in this case, entitled on its docket: *United States of America,* Plaintiff Appellee v. *Gordon Keith Denny,* Defendant Appellant, in Cause No. 9419, and that said judgment of the United States Circuit Court of Appeals for the Seventh

Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Edward J. Leeney
James J. Clark
Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION.

Opinion Below.

No opinion was delivered in the District Court. The decision and judgment of the Circuit Court of Appeals was filed December 30, 1947, and appears at page 282 of the Record. It is not yet reported.

Jurisdiction.

The jurisdiction of this court is invoked under Title 28, U.S.C. Sec. 344 and Rule 38, of the Rules of the Supreme Court of the United States.

Questions Presented.

1. Whether or not an indictment may be amended after it has been returned by a Grand Jury and filed in a United States District Court, by the action of the Judge of the United States District Court or the United States Attorney, acting pursuant to the authority given by the Court, in the light of the Fifth Amendment to the Constitution of the United States, Rule 7 (d) of the Rules of Federal Criminal Procedure, the long-standing opinions of this Court and the Circuit Courts of Appeal, without re-submission to the Grand Jury. (All of which more fully appears in "Questions Presented" appearing in the body of this petition at page 7).

2. Whether a completely contradictory verdict in which a defendant is acquitted on the charge of conspiring to commit a substantive crime, and found guilty of the substantive crime itself, on identical evidence, can be al-

lowed to stand. (All of which more particularly appears under "Questions Presented", IV, as contained in the within petition at page 8 thereof).

Statutes Involved.

Fifth Amendment to the Constitution of the United States, Rule 7 (d) Federal Rules of Criminal Procedure, and Title 18, U.S.C. Sec. 88; Title 18, U.S.C., Sec. 415.

SUMMARY OF ARGUMENT.

I.

After an indictment has been returned by a Grand Jury and filed with the court, no change can be made in the body of the indictment by order of the court, or by the prosecuting attorney, without a re-submission of the case to the Grand Jury.

1. The decisions of the Federal Courts are uniform in holding that the body of an indictment, cannot be changed or amended, by a court or a United States Attorney at the direction of the court, after it has been returned and filed with the Court.

Ex Parte Bain, 121 U. S. 1, 8, 10, 13; 30 L. Ed. 849; 7 Sup. Ct. 781.

Edgerton v. United States, 9 C.C.A.-1944) 143 F. 2d 697, 698, 699.

Garrett v. United States, (5 C.C.A. 1927) 17 F. 2d 479, 480.

Dodge v. *United States,* (9 C.C.A. 1919) 258 Fed. 300, 305.

DeLuca v. *United States,* (2 C.C.A. 1924) 299 Fed. 741, 745.

Stewart v. *United States,* (9 C.C.A. 1926) 12 F. 2d 524.

United States v. *Holtz,* (Dist. Ct. N. Y. 1923) 288 F. 81, 82.

United States v. *Krepper,* (3 C.C.A. 1946) 159 F. 2d 958, 963, 969, 970, 971.

Goto v. *Lane,* 265 U. S. 393, 402; 68 L. Ed. 1074; 44 S. Ct. 525.

Salinger v. *United States,* 272 U. S. 542, 549; 71 L. Ed. 398; 47 S. Ct. 173.

Ford v. *United States,* 273 U. S. 593, 602; 71 L. Ed. 793; 47 S. Ct. 531.

United States v. *Norris,* 281 U. S. 619, 622; 74 L. Ed. 1076; 50 S. Ct. 424.

Roche v. *Evaporated Milk Assc.* 319 U. S. 21, 26; 87 L. Ed. 1185; 63 S. Ct. 938.

Muncy v. *United States,* (C.C.A. 4.) 289 Fed. 780, 781.

Johnson v. *United States,* (C.C.A. 5, 1942) 124 F. 2d 101, 102.

Rawlson v. *Cox,* (C.C.A. 5, 1942) 123 F. 2d 196.

2. The common law rule, prohibiting the amendment of an indictment has been qualified by Rule 7 (d) of the Rules of Criminal Procedure, for the District Courts of the United States, promulgated by the Supreme Court of the United States, and in effect March 21, 1946, to the extent that surplusage may be stricken on the motion of the defendant and not otherwise.

(a) Rule 7 must be considered in its entirety. Rule 7 (d) expressly provides for the striking of surplusage from the indictment or information only on motion of the defendant; 7 (e) expressly provides for the amendment of an information. It nowhere undertakes to authorize the amendment of an indictment.

(b) Being in derogation of the common law, as declared in Ex parte Bain, the rule must be strictly construed; it cannot be extended by implication beyond its express terms, nor change the common law beyond what is expressly declared.

59 C. J. 1124-1127, Sec. 665.

59 C. J. 1129-1130, Sec. 669.

50 Am. Jur. 429, Sec. 405.

50 Am. Jur. 425, Sec. 402.

(c) Inasmuch as Rule 7 (d) provides for the striking of surplusage from an indictment, on motion of the defendant, by implication it prohibits: (1) the striking of any matter, other than surplusage, by any party, on motion or otherwise; (2) the striking of any matter, including surplusage, except on motion of the defendant. This is in accordance with the principle of,

"Expressio unis est exclusio alterius"

59 C. J. 984, Sec. 582.

25 C. J. 220.

Paso Robles Mercantile Co. v. *Com'r of Int. Rev.*, (9 C.C.A. 1929) 33 F. (2) 653, 654.

Raleigh and G. R. Co. v. *Reid*, 80 U. S. 269, 20 L. Ed. 570.

Knapp-Monarch Co. v. *Com'r Int. Rev.*, 139 F. 2d 863, 864.

II.

An amended indictment, is no indictment within the purview of the Fifth Amendment to the Constitution of the United States, providing that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury * * *."

III.

Where there is a verdict of acquittal in one count, of an indictment, and conviction on another count the verdict of conviction should not be allowed to stand unless supported by evidence other than that adduced in support of the count on which there was an acquittal. A verdict of not guilty on the first count, where the only fact the jury had to determine was the presence or absence of "guilty knowledge", should of necessity relieve accused from liability on the second count, where, on the identical evidence, the only element of the crime to be found by the jury was the existence of "guilty knowledge". Accused in the same trial cannot be held not to have had "guilty knowledge", that certain described goods were stolen, as alleged in one count of the indictment, and at the same time, on another count, that he did have "guilty knowledge" that the identical merchandise was stolen.

1. The general statement in a decision to the effect, that, "consistency in a verdict is not necessary," "is to be construed with reference to the question actually under consideration, and should not be extended beyond for any purpose in another and different case."

Cohens v. Virginia, 6 Wheat. 264, 399; 19 U. S. 264.

Wright v. Nagle, 101 U. S. 791, 796; 25 L. Ed. 921.

Humphreys, Executor v. United States, 295 U. S. 602; 627; 55 S. Ct. 869; 79 L. Ed. 1611.

Harriman v. *Northern Securities Co.*, 197 U. S. 244, 291; 25 S. Ct. 493; 49 L. Ed. 532.

Wright v. *United States*, 302 U. S. 583, 593; 58 S. Ct. 395, 82 L. Ed. 439.

O'Donoughue v. *United States*, 289 U. S. 516, 550; 53 S. Ct. 740; 77 L. Ed. 1356.

Daviess v. *Fairborn*, 3 How 636.

Safe Deposit & T. Co. v. *Virginia*, 280 U. S. 83, 99; 50 S. Ct. 59; 74 L. Ed. 180.

Mutual Benefit Health & Accident Assn. v. *Bowman*, 99 F. 2d 856, 858.

Amer. Surety Co. v. *United States*, 239 Fed. 680, 684.

20 Federal Digest Courts, Key No. 107, pp. 427, 432.

20 Federal Digest Courts, Key No. 92, pp. 362, 366.

2. In the majority of the opinions announcing that inconsistence in a verdict does not void the judgment, it is also expressly stated that the case considered presented no inconsistency in the verdict. The generality announced is therefore clear obiter dicta and should not bind an accused in a case where a clear contradiction is evident. The following cases fall into this category:

Dunn v. United States, (1932) 284 U. S. 390, 392; 76 L. Ed. 356; 52 S. Ct. 189.

United States v. Hare, (1946) 153 F. 2d 816, 819.

United States v. Meltzer, (1938) 100 F. 2d 739, 741.

United States v. *General Motors Corp.* (1941), 121 F. 2d 376, 411.

Stein v. *United States* (1946), 153 F. 2d 737, 744.

Audett v. *United States* (1942), 132 Fed. 528, 530.

Foshay v. *United States* (1933), 68 F. 2d 205, 217.

3. Prior to obiter dicta in the Dunn case (Dunn v. United States, 287 U. S. 390, supra), advancing the proposition that, "consistency in a verdict is unnecessary," the Circuit Courts of Appeal for the Third and Eighth Circuits, affirmatively held that "a conviction will not be allowed to stand unless the verdict of conviction is supported by evidence other than the facts pleaded in support of the counts upon which acquittal has been had." These decisions present the better reasoning and the generality above quoted should be qualified to conform with them, and applied to this case.

Speiller v. United States, 1929) 31 F. 2d 682, 684.

Boyle v. United States, 1927) 22 F. 2d 547, 548.
Peru v. United States, 4 F. 2nd 881, 884.
Murphy v. *United States,* 18 F. 2d 509, 510-512.
John Hohenadel Co. v. *United States,* 295 Fed. 489, 490.
Rosenthal v. *U. S.,* 276 Fed. 714.

4. The record discloses that the jury's verdict on the conspiracy count of the indictment was a determination favorable of the facts essential to conviction on the substantive count. The only element left for the jury's determination on both counts was "guilty knowledge" or lack of it, for all other elements were admitted. Having once found petitioner innocent on the conspiracy count, the matter became res judicata, and the jury was precluded from finding him guilty on the substantive count.

Sealfon v. *United States,* 68 Sup. Ct. 237.

ARGUMENT.

I. & II.

Indictment cannot be amended, either at common law or under rules of criminal procedure.

Amendment of an indictment violates the fifth amendment of the Constitution.

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * *."

What is the applicability of these words of the Fifth Amendment to the Constitution, to the case at hand?

1. The record discloses that the second count of the indictment was physically amended, by the United States Attorney pursuant to authority granted by the court, not only by the striking out of a portion of its context, but by the actual addition of new matter (Tr. p. 6).

> "The United States Attorney amended Count II of said indictment by striking therefrom the name 'Gordon Keith Kenny,' and inserting in the place and stead thereof the name 'Gordon Keith Denny' " (Tr. p. 6).

This action, appellant most emphatically contends, was not only a flagrant violation of the Fifth Amendment, but served to nullify this Count II, and convert it into nothing more than an anonymous document of the District Attorney.

No principle seems to have been better established in the English Common law, prior to the American Revolution, than that an indictment once returned by a Grand Jury under oath, was not subject to change by either the court or prosecuting attorney. (*Rex.* v. *Wilkes,* 4 Burr. 2527, tried in 1770) and the matter seems to have been

forever set at rest in this country, by the decision of this Court, in 1886, in the celebrated case of,

Ex Parte Bain, 121 U. S. 113; 7 Sup. Ct. 781, 30 L. Ed. 849.

In the conclusion of this most scholarly opinion by Justice Miller, it is unequivocally announced:

> "We have no difficulty in holding that the indictment on which he was tried was no indictment of a grand jury. The decisions which we have already referred to, as well as sound principle, require us to hold that after the indictment was changed it was no longer the indictment of the grand jury who presented it. Any other doctrine would place the rights of the citizen which were intended to be protected by the constitutional provisions, at the mercy or control of the court or prosecuting attorney; for, if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the Constitution places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists. It is of no avail, under such circumstances, to say that the court still has jurisdiction of the person and of the crime; for, though it has possession of the person, and would have jurisdiction of the crime, if it were properly presented by indictment, *the jurisdiction of the offense is gone, and the court has no right to proceed any further in the progress of the case for want of an indictment. If there is nothing before the court which the prisoner, in the language of the Constitution, can be 'held to answer', he is then entitled to be discharged so far as the offense originally presented to the court by the indictment is concerned. The power of the court to proceed to try the prisoner is as much arrested as if the indictment had been dismissed or a nolle prosequi had been entered. There*

was nothing before the court on which it could hear evidence or pronounce sentence" (p. 13). (Petitioners italics)

With the above language in mind, what is its application to the case under consideration, wherein the government undertook to change the name of the person charged, by actual alteration of the Count. Here again we have no difficulty in ascertaining the view of the court. Quoting with approval from the case of *Commonwealth* v. *Drew*, 3 Cush. 279, the court on page 8 declares:

"Where it is found that there is some mistake in an indictment, as a *wrong name* or addition, or the like, and the grand jury can be again appealed to, as there can be no amendment of an indictment by the court, the proper course is for the grand jury to return a new indictment, voiding the defects of the first." (Appellant's italics) (8).

From the principles announced in the *Bain* case there has been no deviation; as stated in the well considered opinion of:

Edgerton v. *United States* (9 CCA, 1944), 143 F. 2d 697, 698, 699.

"The only apparent qualification to the principle of *Ex Parte Bain* consistently accepted is that to vitiate an indictment the portion deleted must come from the body of the count * * *" (citations). (p. 699.)

In the above case the court probably went further than any of the preceding opinions, in safeguarding if not enlarging upon the doctrine. In that case there was no physical striking of a portion of the indictment. Upon submission of the case to the jury after the government had rested and the defendants had declined to introduce evidence, the court, as the opinion recites, instructed the jury as follows:

"I have already told you that I would strike out

a certain portion of the allegation which is in the indictment, being the first paragraph thereof of page 5. I strike out that portion which says: '• • • theretofore approved as legal investments by the Superintendent of Banks or the Commissioner of Corporations of the State of California • • •.' And in a later reference to this portion of the indictment the jury was '• • • instructed to disregard' the stricken words and to read the allegation as 'That the defendants • • • did represent to the persons intended to be defrauded that the First Security Deposit Corporation would and did loan or advance money only upon security or properties; whereas in truth and in fact, as the defendants • • • well knew, large sums of money • • • were loaned • • • without any security • • •.' It was the opinion of the trial judge that the portion deleted was surplusage and should be stricken for want of proof." (698.)

Even though there was no physical striking, as noted above, the U. S. Circuit Court of Appeals for the 9th Circuit, here cnosidered the above actions of the trial court as tantamount to a physical striking and well within the prohibitions announced in the *Bain* case.

This Honorable Court has had occasion to advert to the doctrine announced in the *Bain case,* in at least five opinions, namely:

(1923) *Goto* v. *Lane,* 265 U. S. 393, 402; 68 L. Ed. 1070; 44 Sup. Ct. 525.

(1926) *Salinger* v. *United States,* 272 U. S. 542, 549; 71 L. Ed. 398, 47 Sup Ct. 173.

(1926) *Ford* v. *United States,* 273 U. S. 594, 602; 71 L. Ed. 793; 47 Sup. Ct. 531.

(1929) *United States* v. *Norris,* 281 U. S. 619, 622; 74 L. Ed. 1076; 50 Sup. Ct. 424.

(1942) *Roche* v. *Evaporated Milk Assc.,* 319 U. S. 21, 26; 87 L. Ed. 1185; 63 Sup. Ct. 938.

While in each of these it was held that the prohibitions laid down in the *Bain* case did not apply, yet in each, it did either expressly or impliedly, reaffirm the soundness of the principles there established.

In a brief of this character it would be presumptuous to attempt an exhaustive review of the opinions handed down by the various courts, construing, qualifying and characterizing the doctrine we have been considering as announced in the *Bain* case. A brief reference to a few, however, is considered imperative. In

Dodge v. *United States*, 258 Fed. 300, 305

the Circuit Court of Appeals, for the Second Circuit, held in 1919, that the striking of the word "mutiny" from an indictment, even though *without objection* constituted reversible error; the theory of estoppel or waiver was not even considered. The court said:

> "At the close of the case counsel for the government moved to strike out as surplusage a portion of the first paragraph of the first count of the indictment and the word "mutiny" from the first paragraph of the second count. Counsel for defendant at once said 'No objection'. *The court granted the motion.* This *is now assigned as error. That it was error of the most serious kind is not to be doubted.* The rule is almost universally recognized, both in this country and in England, *that an indictment cannot be amended by the court, and that an attempt to do so is fatal to a verdict upon the count.*
>
> The *Supreme Court in Ex parte Bain* • • • *declared that it was beyond question that in the English Courts indictments could not be amended, and that no authority had been cited in the American courts which sustained the right of the court to amend any part of an indictment without reassembling the grand jury, unless by virtue of a statute.*" (Appellant's italics.) (305.)

Again in 1927, the 5th Circuit Court of Appeals, in reversing a case because of an amendment to an indictment, stated in

Garrett v. *United States,* 17 F. 2d 479, 480,

> "In addition to entering a formal order setting out the parts to be stricken, the judge wrote in the margin of the indictment memoranda indicating what was to be erased and a pencil was run through the words of the indictment * * * the action of the court resulted in amending the indictment that could not be done legally and amounts to reversible error *Ex parte Bain* * * *." (Appellant's italics.) (p. 480.)

The Second Circuit, in 1929, again had occasion to apply the principle of the Bain decision in a case wherein court had permitted the consolidation of two indictments.

In criticizing this procedure and reversing the judgment, the court in

De Luca v. *United States,* 299 Fed. 741, 745,

among other things announced:

> "* * * Both indictments charge crimes punishable by imprisonment for more than one year * * * *Neither the court nor the government's attorney had the power to add anything to the indictment or to strike anything from it.* Ex parte Bain * * *. The Fifth Amendment to the Constitution requires that the accusation should be charged in the indictment as found by the grand jury. *The only way it could be changed would be by resubmission to the grand jury.*" (745.) (Appellant's italics.)

In keeping with the universal application of the rule, the 9th Circuit Court of Appeals, in 1926, adopted and applied the principle of the *Bain* case, in,

Stewart v. *United States,* 12 F. 2d 524.

Preceding a long quotation from the *Bain* case, the court said:

> "At the commencement of the trial, by consent of counsel for all parties, the court struck from the body of counts 2 and 3 of the indictment, as surplusage, the words, 'feloniously and,' in one place, and the words, 'and feloniously' in another. *This action of the court is now assigned as error. The assignment is well taken.* In ex parte Bain * * * the trial court struck six words from the indictment, as surplusage, and in discharging petitioner on a writ of habeas corpus the court said: (here follows long quotation from the *Bain* case). (Appellant's italics.) (524.)

2. Application of Rule 7 (d) of the Federal Rules of Criminal Procedure.

Let us now consider in what manner this case is controlled or effected by Rule 7(d) of the Rules of Criminal Procedure as adopted by the Supreme Court. It is believed that this is the first case in which the appellate tribunal has been called upon to interpret and apply Rule 7(d), since its adoption.

(a) The context of Rule 7 (d) is simple, and its meaning is clear and unequivocal.

> *"(d) Surplusage. The court on motion of the defendant may strike surplusage from the Indictment or information" (appellant's italics).*

How the meaning of this language is subject to doubt, it is difficult to see.

In the language of the Advisory Committee on the Rules of Criminal Procedure which drafted it, it

> "introduces a means of protecting the defendant against immaterial or irrelevant allegations in an in-

dictment or information, which may, however, be prejudicial. *The authority of the court to strike out surplusage is to be limited to doing so on defendant's motion in the light of the rule that the guaranty of indictment by a grand jury implies that an indictment may not be amended, Ex parte Bain, 121 U. S. 1.*" (Rules of Criminal Procedure, Senate Document 175, page 17. Gov't. Printing Off. 1946, No. 734268.) (Appellant's italics.)

The true meaning of Rule 7(d) becomes clear when the succeeding paragraph or section, (e) of the Rule, is considered. There it is provided:

"(e) The court may permit an *information* to *be amended* at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." (Appellant's italics.)

Then follows, in the official copy of the rules, Senate Document No. 175 (G. P. O. 734268), this editorial comment by the Advisory Committee (p. 17):

"*This rule continues the existing law that, unlike an indictment, an information may be amended, Muncy* v. *United States,* 289 Fed. 780 (C. C. A. 4th)." (Appellant's italics.)

That these rules have been the force and effect of law certainly can be denied by no one; for all practicable purposes they are the same as though they had been enacted by Congress, and must be considered in the same category with the statutory procedural provisions of the Federal Criminal Law. The fundamental rules of statutory construction therefore apply to them. Moreover, the opinions and comments of the Advisory Committee which drafted them are entitled to weight and consideration.

(b) That Rule 7 is in many respects in derogation of the common law is apparent; the principle of statutory construction, as they relate to the issue now under consideration, must therefore be consulted.

Appellant's understanding of the rules of construction applicable here are extremely well expressed in 59 Corpus Juris at 1124-1127 (Sec. 665), in the following language:

> "All statutes in derogation of the common law, or common rights, are to be construed strictly, and as an implied abrogation of the common law is not favored these statutes will not be construed to change the common law beyond what is expressly declared * * *"
>
> "Except there be a change in the policy of the law, such statute will not be extended beyond their precise terms or obvious import, * * *. The courts in construing these statutes, have held that the common law will not be changed by doubtful implication, nor overturned except by clear and unambiguous language, and will be no further abrogated than the clear import of the language requires * * *"
>
> "The courts will not presume that a change was intended by the legislature, unless the language used clearly indicates such intention, and if the statute makes an innovation in the common law, it will be presumed that the legislature did not intend to make any innovation further than required by the mischief to be remedied. The rule to be applied is that they must not be deemed to change the common law or common law rights unless it appears by express words or plain implication that it was the intention of the legislature to do so." (50 C. J. 1124-1127, Sec. 665.)

Regarding procedural statutes in particular, 59 Corpus Juris continues at page 1129 (Section 669):

> "But statutes which take away, change, or diminish fundamental rights, statutory remedies for rights un-

known at common law, and statutes which provide new and extraordinary remedies, must be construed strictly, both as to the cases embraced in their terms and as to the methods to be pursued."

(c) The principle of "expressio unis est exclusio alterius" applies with equal force:

"In accordance with the maxim 'expressio unis est exclusio alterius,'' where a statute enumerates the things upon which it is to operate, it is to be construed as excluding from its effect all those not expressly mentioned; and where it directs the performance of certain things in a particular manner, or by a particular person, it implies that it shall not be done otherwise nor by a different person." 59 C. J. 984 (Sec. 582).

If the Advisory Committee, better than anyone else, knew the meaning of the language of Rule 7, and what was intended to be accomplished thereby, certainly we cannot lightly pass over their citation of:

Muncy v. *United States*, 289 Fed. 780, 781 (C. C. A. 4th),

where it is said:

"As to the first point, we need only observe that it is too well settled to require citation of authority that an information unlike an indictment, may be amended by leave of court, even after motion to quash, demurrer, or plea (22 Cyc. p. 436, and cases there cited), for, as Lord Mansfield observes in *Rex* v. *Wilkes*, 4 Burr. 3567:

" 'There is a great difference between amending indictments and informations. Indictments are found upon oath of a jury, and ought only to be amended by themselves; but informations are as declarations in the king's suit, an officer of the crown has the right of framing them originally, and may, with leave,

amend in like manner as any plaintiff may do.'" (Appellant's italics) (781).

Petitioner trusts he has made manifest that Rule 7 qualifies the common law to the extent that it permits the striking of surplusage from an indictment, on motion of the defendant, and no more; that no valid theory of law can be found which would permit a court, or a United States Attorney, acting pursuant to a court order, to reach down into the body of an indictment, remove the name of the defendant charged by the Grand Jury with the commission of the crime, and replace it with another. The United States Attorney's petition (Tr. 4) states what was done and what was intended to be done in his office. *As to the action of the Grand Jury and its intentions the petition is purely speculative. The United States Attorney did not know and could not have known what transpired in the secret deliberations of that body.* What is known is that the Grand Jury returned and filed with the court its indictment under oath charging in Court II, not the appellant, but one Gordon Keith *Kenny,* with the commission of an infamous crime within the meaning of the Fifth Amendment to the Constitution.

But one conclusion, appellant submits, can be reached and that is, when the trial court permitted the amendment of Count II, and the United States Attorney actually amended it, by striking the name "Gordon Keith *Kenny,*" and substituting the name, *Gordon Keith Denny,* the express provisions of the Fifth Amendment of the Constitution, Rule 7 of the Rules of Criminal Procedure, and the long established principles of the common law were singularly violated, and to allow a conviction on such an Amended Indictment to stand would constitute not only a gross violation of appellant's guaranteed constitutional

rights, but a serious threat to the very fundamentals of constitutional government.

To again employ the language of the *Bain* case,

> "If it lies within the province of a court to change the charging part of an indictment to suit its own motions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the Constitution says "no person shall be held to answer," may be frittered away until its value is almost destroyed" (p. 10).

III.

Contradictory Verdict.

Petitioner is not unmindful of the general proposition advanced by the Supreme Court in the case of,

Dunn v. *United States,* 284 U. S. 390, 392; 52 Sup. Ct. 189; 76 L. Ed. 356; 80 A. L. R. 161,

nor of the several cases of the Circuit Courts of Appeal, following this decision, and applying the broad generality there set forth, namely, that "Consistency in a verdict is not necessary."

1. Because of the fact, however, that he was convicted on an *amended count* of an indictment, in the original of which he was not mentioned, and because of the vigorous and cogent dissenting opinion of Justice Butler in the *Dunn* case, and because there is an equally strong, if not stronger principle of law, namely, that

> *"the language of the court in the opinion is to be construed with reference to the question actually under consideration, and should not be extended beyond for*

any purpose in another and different case." (*Wright* v. *Nagle*, 101 U. S. 791, 796; 25 L. Ed. 921 (1879.)) (Appellant's italics.)

and because he feels that the general principles announced in the recent case of

Sealfon v. *United States*, ... U. S. .....; 68 Sup. Ct. 237

are strikingly applicable to the situation presented in his case, petitioner feels obliged, in justice to himself and in fairness to this court, to set forth his position.

The pertinent part of the statute upon which the amended Count II of the indictment is drawn—Section 415, Title 18, U. S. C. A.—is in context as follows,

> "Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, merchandise, securities, or money, of the value of $5,000 or more theretofore stolen, feloniously converted or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been stolen * * * shall be punished by fine of not more than $10,000 or by imprisonment for not more than ten years, or both. * * *"

An analysis of this statute shows that there are five essential elements of the crime, namely: (1) *"Causing,"* which of course, includes aiding and abetting, and presupposes an understanding or agreement; (2) to be transported in interstate commerce; (3) stolen goods; (4) of the value of $5,000 or more; (5) with *the knowledge that such goods were stolen property.* The amended Count II of the indictment includes all five elements.

Count I of the indictment is drawn under Title 18, Sec. 88, U. S. C. A., the general conspiracy statute. The crime there defined, likewise contains five essential elements,

namely: (1) *an agreement or understanding* between two or more parties; (2) to transport in interstate commerce; (3) stolen goods; (4) of the value of $5,000 or more; (5) *knowing that the goods were stolen property.*

The evidence on which appellant was acquitted on the first Count (conspiracy), and upon which he was convicted in the amended second count (the substantive crime) is identical, the two separate crimes charged, like a coin, figuratively speaking, being but opposite sides, of the one transaction.

Taking up these charges separately let us consider the evidence adduced, on the several elements, separately and independently. As to the proof of the elements of the crime charged in Count I—the alleged conspiracy—the record reveals the following: With regard to (1) the agreement or understanding there is no dispute. Appellant narrated at length that he agreed with co-defendant Brown, in Chicago, to try to find a buyer for a truck load of butter, beef, and hams, in Brown's possession (Tr. 225); that he would call Brown in Chicago when he found a buyer (Tr. 226);

That he called a merchant in Hammond, regarding the sale of "butter, canned hams, and beef" (Tr. 228) in the presence of codefendants Brown and Wishniewski, at their request and later he arranged to deliver the meat to one Carl Yellon, owner of the Columbia Packing Company in Hammond, Indiana (Tr. 126, 231). In fact he freely admitted the agreement or arrangement (Tr. 224-232), and overt acts 1, and 2 of Count I of the indictment (Tr. 1) were amply proved, without objection by appellant (Tr. 227, 171, 228, 173-174, 92). *On this element of the crime charged there was no controversy and the jury had nothing to pass upon.*

(2) Respecting the transportation in interstate commerce (element 2) again the jury had nothing to decide, appellant fully admitted that he went to Chicago, Illinois, and aided in convoying the truck load of meat to Hammond, Indiana (Tr. 233-234).

(3) That the meat was stolen was proved by co-defendants McGhee and McGhee (Tr. 70 and 29), and was uncontroverted by appellant; *this third element being admitted, here again, there was nothing for the jury to determine.*

(4) As to the fourth element, the value of the meat involved in the transaction, it was stipulated that it was of the value of $7,000 (Tr. 22). *Accordingly in this element the jury had nothing to decide.*

(5) The only remaining element of the crime as charged in the indictment is that of guilty knowledge on the part of appellant. *Nothing could be clearer than that the only matter which the jury had to determine was whether or not appellant knew the merchandise was stolen.*

By finding appellant not guilty on Count I of the indictment, and this was in point of time, the first verdict submitted (Rec. 265), the jury *conclusively established that the evidence was not sufficent to prove "guilty knowledge,"* on the part of appellant, for *that is all they had to decide.*

Coming now to Amended Count II of the indictment, charging the *substantive crime,* let the evidence on the essential elements of this crime as set out above be considered, and it is discovered that the elements of (1) causing the, (2) transportation in interstate commerce, (3) of merchandise, (4) of the value of $5,000 or more, are

either all proved without objection, or controversy, or are admitted (supra p. 34 and 35). Accordingly *there was again nothing for the jury to decide on this count, but the question as to whether appellant knew the meat in question was stolen.*

But the jury had already found that the *appellant did not know that the goods were stolen* in its verdict on Count I. Under what principles of logic or reason could it be said by the jury, as it did, in the next breath, on the same evidence, and in the same transaction, that the *defendant did know the merchandise in question was stolen property?* How can these repugnant and contradictory verdicts be reconciled in any consistent system of jurisprudence, or be permitted to stand by an appellate court? The only answer to be found is that appearing in the dicta of the Supreme Court in the *Dunn* case, and the cases following it.

Before considering the propositions of law advanced by Justice Holmes, speaking for the Supreme Court, attention should be given to the facts to which the court was required to apply the principle announced in,

Dunn v. *United States* (1932), 284 U.S. 390, 392; 76 L. Ed. 356; 52 S. Ct. 189.

The appellant there was indicted on three counts: "first for maintaining a common nuisance by keeping for sale at a specified place intoxicating liquor; second, for unlawful possession of intoxicating liquor; and third, for the unlawful sale of such liquor. The jury acquitted him on the second and third count and found him guilty on the first." The appellant insisted that the verdict in the second and third counts is inconsistent with that upon the first and that "for this reason he is entitled to be discharged."

The evidence as reviewed in the opinion, discloses:

"The defendant owned the establishment where the alleged sale took place. It consisted of a front room where fishing tackle, sporting goods, cigars and soft drinks were sold, and a larger room in the rear with pool tables and a bar. Two prohibition agents and two unknown men walked in and ordered from the defendant three glasses of whiskey and one of beer and were served without further conversation. A little later two more drinks were called for and furnished. The whiskey was served in ordinary whiskey glasses from underneath the bar and the money paid for it, twenty-five cents a glass, was put into a cash register behind the bar." (392.)

The court then proceeded to announce that the *verdicts* were *"not necessarily inconsistent,"* and reasoned thus:

"The testimony, if believed, showed a regular course of business, which manifestly was continuous, Fisher v. *United States* (C. C. A. 4th), 32 F. (2d) 602, 604, *and warranted a verdict of guilty on the nuisance count.* The defendant gave evidence that he was elsewhere at the time of the alleged sale and did not make it. *He contends that the verdict is inconsistent, since it negatives possession and affirms the nuisance,* the proof of the commission of both alleged offenses consisting of identical evidence. The Government says that even though the jury seems to have believed that the defendant was elsewhere at the time of the alleged sale, and did not make it, the *verdict is not necessarily inconsistent,* for some third person, with defendant's knowledge, may have been doing business on the premises, and if so they were a nuisance, and the defendant was guilty although he neither possessed nor sold intoxicating liquors upon them; that whereas the Government's witnesses may have been mistaken in saying that the defendant sold, they may have been right to the extent that someone did *and if that be true the defendant's knowledge*

could be inferred, this being his place of business and he being habitually present there. It is further argued that it may be inferred that he received the money coming from the sale, and that he knowingly abetted the seller in the acts that created the nuisance on the premises that the defendant controlled." (392) (Appellant's italics).

The facts in this case are remarkably similar to those presented in the case of,

Carrignan v. *United States,* 290 Fed. 189, 190 (1923)

and the reasoning of the court as expressed by Judge Evans, in the opinion in that case, is strikingly parallel to that of Justice Holmes in the *Dunn* case. There it is said:

"Nor is the case similar to that of *Rosenthal* v. *United States* (C. C. A.), 276 Fed. 714. In that case the defendant was charged with having purchased and received stolen property with knowledge that it was stolen, and also charged by another count with having the same property in his possession, with the knowledge, the evidence showing that the two counts related to the same transaction. *The second offense charged but a part of the first offense and the separate convictions for the two alleged offenses could not have been sustained. It was therefore held that a verdict of not guilty in the first count necessarily relieved defendant from liability on the second count.*" See also *Murphy* v. *United States* (C. C. A.), 285 Fed. 801.

"In the present case plaintiff in error could have been convicted and sentenced upon both counts of the indictment. *He could have been found guilty of either offense without having been guilty of the other.* To illustrate: The jury might have found that the evidence showed the liquor sold the government witnesses was not intoxicating within the definition of the act,

and yet, in view of the intoxicated condition of other individuals in the barroom, coupled with the fact that liquor was sold and delivered to them while the government witness was present, have also found that the premises were being conducted as a nuisance." (190) (Appellant's italics).

Thus it is seen that *in neither of the above cases was there an inconsistent verdict,* the courts holding that there was ample evidence to sustain the nuisance count, in each, regardless of the charges contained in the other counts. Certainly it cannot be said that these cases belong in the same category with the one now being considered; the present case involves almost the precise question as that considered in the *Rosenthal* case, and the characterization given that case by Judge Evans, as above set forth should here apply.

Appellant's argument resolves itself into this proposition, that inasmuch as the *above opinions manifestly disclose that the verdicts were not contradictory,* the proposition there announced that "consistency in a verdict is not necessary," has no application, nor is it a binding tenet of the law in this case, further that *the broad and unqualified generality set forth could not be controlling here, for the reason that it must be "construed in the light of the issues presented and considered," in the case in which it is employed, and "should not be extended beyond that for any purpose of authority in another and different case." Mutual Benefit Health and Accident Ass'n* v. *Bowman,* 99 Fed. 2d 856, 858 (C. C. A. 8) (1938).

To sustain this proposition Petitioner relies on an opinion of no less dignity or weight than that handed down by Chief Justice Marshall in the case of

Cohens v. *Virginia,* 6 Wheat. 264, 399; 19 U. S. 264.

Qualifying a general proposition of law appearing in the equally celebrated case of *Marbury* v. *Madison,* 1 Cranch 137, the opinion of which also came from the pen of the great Chief Justice Marshall, the *Cohens* decision establishes the principle, here appealed to, in these words:

> "It is a maxim, not to be disregarded, that *general expressions are to be taken in connection with the case in which the expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision.* The reason for the maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all cases is seldom investigated." (399) (Appellant's italics).

This statement of the law has been repeatedly applied and quoted in numerous subsequent opinions of the Supreme Court and the Circuit Courts of Appeal, it appears verbatim in,

> *Humphreys Executor* v. *United States* (1935), 295 U.S. 602, 627; 55 S. Ct. 869; 79 L. Ed. 1611.
> *O'Donoughue* v. *United States,* (1933), 289 U. S. 516, 550, 593; 53 S. Ct. 740; 77 L. Ed. 1356.
> *Wright* v. *United States* (1938), 302 U. S. 583, 593; 58 S. Ct. 395; 82 L. Ed. 439.

(2) In at least three cases Circuit Courts have followed the *Dunn* case and announced approval of the general proposition of law there announced. It is to be noted, however, that the facts in these cases are entirely different from the case at bar, and in two instances, the court expressly stated that *there was no inconsistency in the verdicts,* which, appellant contends, brings these decisions

within the purview of the principle set forth in the *Cohens* case above, and removes them as binding authorities, in the case now under consideration.

It is therefore respectfully submitted that the general proposition to the effect that "inconsistent verdicts are not fatal," and that they "afford no valid grounds for setting aside a verdict," as announced in these opinions was wholly unnecessary to the decisions there rendered, and amounted to no more than the expressions of a general opinion within the meaning of *Cohens* v. *Virginia;* and that because of this fact they are controlled by broader propositions, as restated in,

Harriman v. *Northern Securities Co.,* 197 U.S. 244, 291; 25 S. Ct. 493; L. Ed. 532,

to the effect that,

> "* * * *general expressions of an opinion which are not essential to dispose of the case are not permitted to control the judgment in subsequent suits. Cohens* v. *Virginia* * * *" (Appellant's italics) (291),

and should not be made use of to defeat Petitioner's position on this point. More appropo and persuasive is the decision in the case of,

Rosenthal v. *United States,* 276 F. 714,

inferentially approved in *Carrignan* v. *United States,* 290 Fed. 189, 190.

3. Prior to the advent of the *Dunn* case, two irreconcilable lines of decision prevailed in the Circuit Court of Appeals, on the status and effect of "inconsistent" and "repugnant" verdicts. As pointed out in a decision of the Eighth Circuit, handed down in 1927, in

Boyle v. *United States,* 22 F. 2d 547, 548,

> "There exists diversity of opinion among various federal courts as to the effect of an inconsistent ver-

dict, where there are different counts in an indictment. On the one hand, it has been held that, where a jury convicts upon one count and acquits upon another, the conviction will stand, though there is no rational way to reconcile the two conclusions. Such is the holding in the Second, Sixth, and *Seventh* Circuits.

Marshallo v. *U. S.*, 298 F. 74 (C. C. A. 2);
Steckler v. *U. S.*, 7 F. (2d) 59 (C. C. A. 2);
Seiden v. *U. S.*, 16 F. (2d) 197 (C. C. A. 2);
Gozner v. *U. S.*, 9 F. (2d) 603 (C. C. A. 6);
Carrignan v. *U. S.*, 290 F. 189 (C. C. A. 7).

"On the other hand, it has been held under similar circumstances that the conviction will not be allowed to stand unless the verdict of conviction is supported by evidence other than that facts pleaded in support of the counts upon which acquittal has been had. This is the view adopted in this circuit and apparently in the Third.

Peru v. *U. S.*, 4 F. (2d) 881 (C. C. A. 8);
Murphy v. *U. S.*, 18 F. (2d) 509 (C. C. A. 8);
John Hohenadel Co. v. *U. S.*, 295 F. 489 (C. C. A. 3)."

In accord with the dissenting opinion of Justice Butler in the *Dunn* case and that of Judge Donahue in the case of *Gozner* v. *United States,* 9 F. 2d 603, the principles laid down in

Speiller v. *United States,* (C. C. A. 3, 1929), 31 F. 2d 682, 684,

it is submitted; advance the sounder reasoning which would here apply. There the Court expressed itself in the following language,

"In the instant case, the verdict of guilty in the first count is not based on other evidence than that on which the jury found the defendant not guilty on the second count. The government relied upon the same facts to support a conviction in both counts. *In the second count, the jury said, in substance, that these*

alleged facts are not true; they have no legal existence. Where there is an acquittal on one count, charging the same crime, the verdict of conviction will not be allowed to stand unless supported by evidence other than on which the acquittal was based. (*Peru* v. *United States*, 4 F. (2d) 881 (C. C. A. 81); *Murphy* v. *United States*, 18 F. (2d) 509 (C. C. A. 8); *Boyle* v. *United States*, 22 F. (2d) 547 (C. C. A. 8). * * * *When the liberty of a citizen is at stake, a jury will not be permitted to make a plaything of the verdict and blow hot and cold at the same time*" (684). (Appellant's italics.)

Enlarging upon the proposition set down in the decision just quoted, appellant submits that the first essential of any system of jurisprudence is, that it be consistent in and with itself. That the law abhors unnatural conclusions and absurd consequences is a principle as old as the concept of justice itself.

Insisting from the outset as he did, that he thought that he was dealing in "black market" goods and did not know that the merchandise involved was stolen property (Tr. p. 237), upon what rational basis conceivable can it be said, in this matter involving but a single transaction, that he both "knew" the meat was stolen, and at the same time "did not know" the meat was stolen; that a thing can "be" and "not be" at the same time, for reduced to its final analysis, that is the inevitable conclusion reached by the jury in its separate verdicts.

It is again respectfully submitted that the only major difference between the case at hand and that of

Sealfon v. *United States*, ... U.S. .....; 68 Sup. Ct. 237

is, that here, contradictory verdicts were rendered in a single trial, and in the latter case they were rendered in two successive trials. If the principle of res judicata applied in the *Sealfon* case, why should it not apply with greater

force in the instant case, where the jury after first finding the petitioner not guilty of the crime of conspiracy, with all of the evidence before it, then undertook to find him guilty of the substantive crime, and on a count of the indictment in the original of which he was never actually named.

CONCLUSION.

Summarizing, petitioner respectfully trusts that he has made manifest, that the United States District Court erred, to his great injury and prejudice in the following particulars, (1) in permitting and directing the amendment of Count II of the Indictment; (2) in obliging the appellant to stand trial on the amended Count II of the Indictment; (3) in overruling his Motion in Arrest of Judgment setting up the errors pointed out in (1), (2), and (3) above, and challenging, in addition, the contradictory, repugnant and inconsistent character of the verdict of the jury.

He further respectfully submits that the Circuit Court of Appeals has erroneously interpreted the provisions of the Fifth Amendment to the Constitution of the United States, Rule 7 (d) of the Federal Rules of Criminal Procedure, and the long-standing principles announced and followed in *Ex Parte Bain;* that the dissenting opinion of Circuit Judge Minton correctly states the law with respect to the amendment of an indictment, and this Court's decision in *Sealfon* v. *United States* sustains his position with respect to the contradictory verdict.

Wherefore, petitioner respectfully prays that his Petition for a Writ of Certiorari be granted, and that he be accorded all necessary and proper relief incident thereto.

Respectfully submitted,

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Attorneys for Petitioner.

APPENDIX.

Title 18, United States Code, Section 415, provides:

"Whoever shall transport or cause to be transported in interstate or foreign commerce any goods, wares, or merchandise, securities, or money, of the value of $5,000 or more theretofore stolen, feloniously converted, or taken feloniously by fraud or with intent to steal or purloin, knowing the same to have been so stolen, feloniously converted, or taken, or whoever with unlawful or fraudulent intent shall transport or cause to be transported in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities, knowing the same to have been falsely made, forged, altered or counterfeited, or whoever with unlawful or fraudulent intent shall transport, or cause to be transported in interstate or foreign commerce, any bed piece, bed plate, roll, plate, die, seal, stone, type, or other implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security, or any part thereof, shall be punished by a fine of not more than $10,000 or by imprisonment for not more than ten years, or both: Provided, That the provisions of this section shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of (1) an 'obligation or other security of the United States' as defined in section 261 of this title or (2) an obligation, bond, certificate, security, treasury note, bill, promise to pay, or bank note, issued by any 'foreign government' as defined in section 288 of this title, or by a bank or corporation of any foreign country. May 22, 1934, c. 333, Section 3, 48 Stat. 794, as amended Aug. 3, 1939, c. 413, Section 1, 53 Stat. 1178."

Title 18, United State Code, Section 88, provides:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the

United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both. (R. S. Section 5440; May 17, 1879, c. 8, 21 Stat. 4; Mar. 4, 1909, c. 321, Section 37, 35 Stat. 1096.)"

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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 550

GORDON KEITH DENNY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of Circuit Judge Kerner (R. 282–286), the concurring opinion of District Judge Lindley (R. 286–287), and the dissenting opinion of Circuit Judge Minton (R. 287–290) are not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered December 30, 1947 (R. 290). The petition for a writ of certiorari was filed January

26, 1948. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether a district court may authorize the correction of a typographical error in a count of an indictment, consisting of a mistyping of the initial letter of the defendant's surname, without requiring that the indictment be resubmitted to the grand jury.

2. Whether, assuming that a defendant's conviction on one count of an indictment is inconsistent with his acquittal on another count, the conviction is nevertheless sustainable.

STATEMENT

Count 1 of a three-count indictment (R. 1–2) filed in the District Court for the Northern District of Indiana, charged that petitioner and five others conspired to cause the transportation of stolen goods in interstate commerce with knowledge of their stolen character. Count 2 charged the same defendants with committing the substantive offense. The third count did not concern petitioner, and need not be considered.

In both the caption and the first count of the indictment, petitioner's name correctly appeared as "Gordon Keith Denny". In the second count,

however, his name was misspelled "Gordon Keith Kenny". Petitioner filed a motion to dismiss the second count on the ground that he was not and never had been known as "Gordon Keith Kenny" (R. 3). The Government thereafter filed a verified petition to amend count 2 by substituting the name "Denny" for "Kenny"; the petition alleged that "the reference to the person the Grand Jury indicted as Gordon Keith Kenny was a stenographic mistake, the stenographer who was drawing the indictment inadvertently striking the letter 'K' instead of the letter 'D,' and that the person the Grand Jury was indicting for the offense set forth in the second count of the indictment is one and the same person as the Gordon Keith Denny referred to in Count I of the said indictment" (R. 4). Petitioner's motion to dismiss was denied, the Government's petition to amend was granted (R. 5), and count 2 was amended accordingly (R. 6). Petitioner's subsequent motion to dismiss the amended indictment on the ground that it was not the indictment found by the grand jury (R. 6–8) was denied (R. 9).

Following a trial by jury, petitioner was found not guilty on count 1 and guilty on count 2 (R. 265–266). A motion in arrest of judgment (R. 266–269), in which petitioner renewed his objection to the amended indictment and in which he also alleged inconsistency in the verdict, was

denied (R. 269), and petitioner was sentenced to five years' imprisonment and fined $5,000 (R. 270).

On appeal to the Circuit Court of Appeals for the Seventh Circuit, the judgment of conviction was affirmed (R. 290), one judge dissenting on the sole ground that it was error to try petitioner on an amended indictment (R. 287–290).

ARGUMENT

1. Petitioner contends that he was deprived of his right under the Fifth Amendment[1] by the action of the trial court in permitting the Government to amend the indictment without resubmitting it to the grand jury for their approval (Pet. 21–32). The contention is without merit. The amendment permitted was for the purpose of correcting an obvious typographical error. Petitioner's full name—Gordon Keith Denny—correctly appeared in both the caption and the first count of the indictment. In the second count, the initial letter of his surname was erroneously typed "K" by the stenographer who typed the indictment.[2] In substance, therefore, the amendment in no way changed the indictment found by the grand jury, but merely corrected a stenographer's typing error. 18 U. S. C. 556 pro-

[1] "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury * * *."

[2] Petitioner did not, and does not, controvert this statement in the Government's verified petition to amend count 2.

vides that "No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant".[2] From this it is clear that, even if the error had not been corrected, petitioner's conviction would be unassailable. *Capriola* v. *United States,* 61 F. 2d 5, 11–12 (C. C. A. 7), certiorari denied, 287 U. S. 671; cf. *Faust* v. *United States,* 163 U. S. 452, 454. "Common sense and judicial precedent, alike, sustain the view that indictments are not subject to attack simply because of a mistake in the spelling or the initials of one of the parties." *Capriola* v. *United States, supra,* at p. 12. Plainly, therefore, correction of the inaccuracy in the interest of technical perfection was permissible. *United States* v. *Fawcett,* 115 F. 2d 764, 765–767 (C. C. A. 3); *United States* v. *Empire Hat & Cap Mfg. Co.,* 47 F. Supp. 395, 401 (E. D. Pa.).

In *Ex parte Bain,* 121 U. S. 1, cited by petitioner in support of his contention, there had been a substantive amendment of an indictment to pre-

[2] See also 28 U. S. C. 391, providing that "* * * On the hearing of any appeal, certiorari, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties".

vent an adverse ruling on demurrer. As this Court observed in *Salinger* v. *United States,* 272 U. S. 542, 549, "In the case of *Ex parte Bain* * * * there was an actual amendment or alteration of the indictment to avoid an adverse ruling on demurrer, and the trial was on the amended charge without a resubmission to a grand jury. The principle on which the decision proceeded is not broader than the situation to which it was applied."[4] The *Bain* decision, therefore, cannot successfully be invoked to condemn the action of the trial court in this case. The Fifth Amendment has a higher purpose than to proscribe correction of an obvious misnomer in a single count of an indictment, arising not from any error on the part of the grand jury, but from a typist's mistake.

2. Petitioner's only other contention—that his conviction on count 2 cannot stand because it is inconsistent with his acquittal on count 1 (Pet. 32–44)—is equally without merit. It is well settled that consistency in a verdict is not necessary, each count in an indictment being regarded as if it were a separate indictment. *Dunn* v. *United States,* 284 U. S. 390, 393; *Borum* v.

[4] We see nothing in Rule 7 (d) of the Federal Rules of Criminal Procedure, relied upon by petitioner (Pet. 27–32), to indicate that this Court, in promulgating the Rule, was of the view that the principle on which the *Bain* decision proceeded was, contrary to the quoted statement in the *Salinger* case, broader than the situation to which it was applied.

United States, 284 U. S. 596; *Stein* v. *United States,* 153 F. 2d 737, 744 (C. C. A. 9), certiorari denied, 328 U. S. 834; *United States* v. *Capone,* 93 F. 2d 840, 841 (C. C. A. 7), certiorari denied, 303 U. S. 651; *Crichton* v. *United States,* 92 F. 2d 224, 227 (App. D. C.), certiorari denied, 302 U. S. 702; *Long* v. *United States,* 90 F. 2d 482, 484 (C. C. A. 9), certiorari denied, 302 U. S. 730; *Carroll* v. *United States,* 16 F. 2d 951, 954 (C. C. A. 2), certiorari denied, 273 U. S. 763; cf. *United States* v. *Dotterweich,* 320 U. S. 277, 279.[5] It is unnecessary, therefore, to examine the merits of the contention that the acquittal on the conspiracy count logically required acquittal on the substantive count as well because, allegedly, the only controverted issue under each count was petitioner's knowledge of the stolen character of the goods in question.

CONCLUSION

The petition for a writ of certiorari presents no question requiring further review by this

[5] *Sealfon* v. *United States,* No. 174, decided January 5, 1948, does not question this well-settled rule, as petitioner contends (Pet. 43–44). That case involved a trial and conviction of a substantive offense on the aider and abettor theory following the accused's acquittal of conspiracy to commit the offense. The facts relied on in the first trial to establish the alleged conspiracy were essentially the same as those relied on in the second trial to establish the aiding and abetting. The decision was based on the principle of *res judicata.*

Court. We therefore respectfully submit that it should be denied.

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